

## **§ 76.27**

a deposition, the production of evidence within the party's control, or a request for admission the Judge may, as appropriate under law:

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission as to unprivileged matters, deem admitted each matter of which an admission is requested;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought;

(4) Strike any appropriate part of the pleadings or other submissions of the party failing to comply with such order; and

(5) Permit the requesting party to introduce secondary evidence concerning the information sought.

(d) If a party fails to prosecute an action under this part commenced by service of a notice of hearing, the Judge may dismiss the action.

(e) If a respondent who has requested a hearing pursuant to 28 CFR 76.4, and who has been served with a Notice of a Hearing under 28 CFR 76.6, fails to appear at the hearing, absent good cause shown by the respondent, the Judge may issue an initial decision imposing a penalty.

(f) The Judge may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

### **§ 76.27 The hearing and burden of proof.**

(a) The Judge shall conduct a hearing on the record in order to determine whether the respondent is liable for a civil penalty under 28 CFR 76.3 and, if so, the appropriate amount of any such civil penalty, considering the income and net assets of the respondent.

(b) The United States Attorney shall prove respondent's liability and appropriateness of the amount of the penalty by a preponderance of the evidence.

(c) The respondent shall prove any affirmative defenses by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise closed by the Judge for good cause shown.

## **28 CFR Ch. I (7-1-05 Edition)**

### **§ 76.28 Location of hearing.**

The hearing shall be held in the judicial district of the United States Attorney's Office having jurisdiction over the matter.

### **§ 76.29 Witnesses.**

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the Judge and to the extent otherwise permitted by law, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties, along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena, if necessary, such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in 28 CFR 76.22.

(c) The Judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth;

(2) Avoid needless consumption of time; and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The Judge shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the Judge, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination.

(f) Upon motion of any party, the Judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This part does not authorize exclusion of the following:

(1) The respondent;

(2) An individual whose presence is shown by a party to be essential to the presentation of its case.

### **§ 76.30 Evidence.**

(a) The Judge shall determine the admissibility of evidence.